UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

FLIGHT SERVICES & SYSTEMS, INC.	)	
	)	
and	)	CASE 01-CA-183911
	)	01-CA-189755
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ	)	01-CA-194600
	)	
	)	

RESPONDENT, FLIGHT SERVICES & SYSTEMS, INC.'s
REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO ITS
MOTION FOR SUMMARY JUDGMENT/ TO DISMISS

Now comes the Respondent, Flight Services and Systems, Inc. ("FSS"), by and through its undersigned counsel and, pursuant to Section 102.24 (c) of the Rules of the National Labor Relations Board ("the Board"), respectfully submits its following reply to the General Counsel's opposition to its motion for summary judgment/to dismiss. Upon consideration of the relevant evidentiary materials properly before the Board, and the arguments of law presented in both FSS's original filings and this brief, it is again respectfully requested that the Board find that it lacks jurisdiction and dismisses the complaint or, in the alternative, refers the question of jurisdiction to the National Mediation Board ("NMB") for an opinion on the question of jurisdiction.

I. REPLY RE: DETERMINATION OF THE SUMARY JUDGMENT MOTION

In *Western Electric*, 198 NLRB 623 (1972) at 623-624, this Board stated:

> "The General Counsel in his statement in opposition to the Respondent's motion does not directly contest the accuracy of the Respondent's affidavits but instead argues that their submission demonstrates the need for an evidentiary hearing. Further, the General Counsel asserts that the affidavits relate to a key issue and that reliance on them would "introduce into the Board's proceeding a concept alien to Anglo American jurisprudence-trial by affidavit."
> Federal Rule of Civil Procedure 56(b) provides that the defending party may move for summary judgment, in whole or in part, at any time with or without supporting affidavits. Moreover, FRCP 56(e) provides in pertinent part that:
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
> The Respondent, by its motion, admits the essential factual allegations of the complaint. In its supporting affidavits and accompanying exhibits, the Respondent set forth additional facts which form the basis of its affirmative defense. <u>The General Counsel, having failed to controvert these additional facts, has not met the burden imposed upon an adverse party by the aforementioned rule.</u> In these circumstances, we are satisfied that there are no material facts in dispute which require a hearing before a Trial Examiner. We shall, accordingly, rule upon the merits of the Respondent's Motion for Summary Judgment. (emphasis added; footnote omitted)."

Accord, The Samurai, Inc., d/b/a The Samurai/Kabuki Japanese Steak House , 229 NLRB 404 (1977) at 404-405; *NLRB v. Dane County Dairy*, 795 F.2d 1313,1321 (7th Cir. 1986) ("Summary judgment proceedings before the NLRB are equivalent to summary judgment under Fed. R. Civ. P. 56."). Here, the General Counsel has failed to dispute any material facts with evidentiary materials admissible under Civ. R. 56. The complaint and answer, attached as Exhibits B and C to the General Counsel's brief, only show that jurisdiction has been controverted by FSS, and not conceded, consented to, nor have any objections been waived. The settlement agreement attached as Exhibit A, and the agreement between the Massachusetts Port Authority and FSS attached as exhibit D, are not sworn to or authenticated in any way. No affidavits, declarations, or other sworn proof enumerated in Civ. R. 56, or in the Board decisions or cases applying summary judgment procedures, are attached. Thus, the General Counsel has not factually disputed FSS' motion, or filed any materials to demonstrate that there is a genuine issue of material fact for trial.

The General Counsel's repeated assertions that it will produce evidence at trial is utterly insufficient to defeat a motion for summary judgment. "The party seeking to avoid the summary judgment may not rely on a mere denial of the allegations contained in the complaint but must present specific facts that demonstrate that there are material factual issues requiring a hearing." *Dane County Dairy, supra.* (emphasis added). Here, without having presented specific facts demonstrating that there is a need for a hearing, the unsupported allegation that facts will, at some time in the future, be presented, is not demonstrated. Upon the still unchallenged facts of record submitted by FSS, summary judgment must be granted.

II. REPLY RE: FACTUAL INACCURACIES IN THE GENERAL COUNSEL'S BRIEF

The General Counsel, at p.6 of its brief, makes the utterly false assertion that in support of its motion, FSS attached "documents, including self-serving, unsworn affidavits from Respondent's chief executive officer and its own attorney…" As anyone who bothered to take the time to actually look at the exhibits appended to FSS' motion would see, the sworn affidavits of Robert Weitzel and Robert Armstrong recite, from personal knowledge, facts relating to the activities of the carriers for which FSS performs duties, and the degree of actual control over FSS employees these activities demonstrate. These affidavits, along with the affidavits of Dia Ray and Thomas Marotta, also authenticate documents in the manner required by Civ. R. 56, a procedure General Counsel is subject to, but chose to ignore. The documents authenticated by Mr. Marotta demonstrate that the issue of the Board's jurisdiction over FSS has been raised early and often, since the failure to assert the defense at every turn would certainly result in some claim by General Counsel of waiver of the defense.[1] The affidavits are sworn, and the documents, unlike anything submitted by the General Counsel, are authenticated. FSS hereby objects to the documents submitted by the General Counsel, requests that the not be considered in these proceedings, and moves that they be stricken.

In addition, General Counsel attaches an unsworn, unauthenticated copy of a settlement agreement between the Board and FSS from a 2015 dispute. It is asserted that this demonstrates that FSS has somehow conceded the jurisdictional issue. Even a cursory reading of that settlement (if it can be considered, which it cannot) shows that, while General Counsel reserved the right to use any evidence developed in connection with that charge in later charges, FSS also reserved the right to raise any and all defenses it has in future charges, such as the ones at bar. No concession of jurisdiction has been made by FSS.

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[1] *Cf. Allied Aviation Serv. v. NLRB,* 854 F.3d 55, 63 (D.C. Cir., 2017). In which the Court found that the Respondent failed to raise the issue of NMB jurisdiction until too late, and also failed to develop a record to show that jurisdiction. Neither of those deficiencies is present in the case at bar.

Third, in a footnote on p. 7, the assertion is made, without any support whatsoever, that in a 2008 case, not involving a dispute over NLRB jurisdiction, but involving three skycaps and the application of minimum wage laws, FSS took the approach that it was an independent contractor. This is utterly irrelevant, since every entity under RLA jurisdiction which is not actually a carrier, but which is "indirectly controlled" by a carrier would be an independent contractor under a common law test. This, even if proved, does not affect the analysis under relevant NMB and NLRB precedent.

Finally, the General Counsel makes an assertion that FSS has some "natural advantage" in adducing evidence[2] in these proceedings regarding its operations. With all due respect, this is completely disingenuous, and ignores the enormous power, including subpoena power, that General Counsel enjoys during the investigatory phase of a charge, which General Counsel exercised at every turn. It is also self-contradictory since, in the General Counsel's brief, the repeated assertion is made that it has evidence, which it will produce at trial, but just chooses to not produce at this time. This is a continuation of the typical "trial by ambush" tactic enjoyed by General Counsel and its Union ally. However, in a summary judgment case, the failure to actually produce the evidence necessary to demonstrate an issue for trial is fatal to that objection to the motion. *See, Western Electric, supra*, at 624 ("The General Counsel, having failed to controvert these additional facts, has not met the burden imposed upon an adverse party by the aforementioned rule.").

Despite the General Counsel's factual errors, the motion must be granted.

III. REPLY RE: THE ITS CASES

[2] Citing *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405 (1998), a wholly inapposite case having nothing to do with jurisdiction.

In the *International Total Services* cases, 9 NMB 392 (1982), 11 NMB 67 (1983), 16 NMB 44 (1988), 20 NMB 537 (1993), 24 NMB 18 (1996), and 26 NMB 72 (1998) the National Mediation Board ("NMB"), looking at ITS's operational arm, found, in each case, at airports throughout the United States, that ITS is subject to RLA jurisdiction. Two undisputed facts are present before this Board: (1) FSS is ITS's operational arm at Boston Logan airport; and (2) the operations of FSS are substantially the same as those previously ruled upon by the NMB. To suggest that this consistent run of cases has no bearing on this summary judgment motion, or does not compel the legal conclusion that FSS is subject to RLA jurisdiction, flies in the face of this long-standing precedent, which General Counsel and its SEIU ally seek to reverse. If any weight to relevant, applicable precedent is to be given in these proceedings, then FSS must be found to be subject to RLA jurisdiction.

More significantly, the NMB decision at 20 NMB 537 (1993) expressly found that ITS's entire airline services division (i.e., FSS), nationwide, was one system subject to the RLA.[3] Thus, the assertion made by the General Counsel that there has been no NMB determination applicable to Logan Airport is, as a matter of law, without foundation. Jurisdiction under the NLRA is, as a matter of law, lacking here.

IV. REPLY RE: THE *ABM ON-SITE SERVICES – WEST, INC.* DECISION

General Counsel expends an enormous amount of time and effort in asserting that the decision of the D.C. Circuit in *ABM Onsite Servs.-West, Inc. v NLRB,* 849 F.3d 1137 (D.C. Cir. 2017), did not overrule or vacate post-2013 decisions of the NMB and NLRB, which applied the more restrictive test of a carrier exercising a substantial degree of control over firing and discipline of a company's employees before it would find that company subject to the RLA. *Id.* at 1144. The Court did, however, expressly find, at 1142:

[3] *See, also,* 26 NMB 72.

> "This case turns on the fundamental principle that an agency may not act in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The NLRB has violated that cardinal rule here by applying a new test to determine whether the RLA applies, without explaining its reasons for doing so. Because an agency's unexplained departure from precedent is arbitrary and capricious, we must vacate the Board's order." (emphasis added)

Thus, the post-2013 decisions, all of which are relied upon by the General Counsel in its brief in opposition, and all of which apply the unexplained standard which the D.C. Circuit found to "arbitrary and capricious" cannot be relied upon. True, *ABM Onsite Servs.-West, Inc.,* did not expressly overrule those decisions; however, unless and until a reasoned basis for applying the post-2013 rationale is supplied by either the NMB or the NLRB, to rely upon them is to invite reversal, as happened in that case.

V. REPLY RE: REFERRAL TO THE NMB

General Counsel spends pages and pages of its brief in opposition arguing that the Board has the legal ability to determine jurisdiction. This is not really in dispute. The issue is whether or not it should, in this case, make that determination, or whether it should refer the matter to the NMB for an opinion.

In *United Parcel Service*, 318 NLRB 778, 780 (1995), aff'd *sub nom. United Parcel Serv., Inc. v. NLRB,* 92 F.3d 1221, (D.C. Cir. 1996), the Board held:

> "Nevertheless, we find that the general policy of referral which the Board has followed for nearly 40 years has important policy advantages. First, the practice enables the Board to obtain the NMB's expertise on jurisdictional matters most familiar to it. Second, the practice minimizes the possibility of conflicting agency determinations.
>
> Despite this general practice of referral, there have been exceptions in which the Board has found referral unnecessary or unjustified. The Board has not referred to the NMB cases presenting jurisdictional claims in factual situations similar to those where the NMB has previously declined jurisdiction. The Board has also

not referred to the NMB cases which involve employees of an air carrier who are in no way engaged in activity involving airline transportation functions and whose work normally would be covered by the NLRA.

Finally, and most significantly in the present case, the Board has also declined to refer RLA claims to the NMB for an initial opinion in cases where the Board has previously exercised uncontested jurisdiction over the employer. "

Here, none of the exceptions to the "general policy of referral" to the NMB are present. Here, in prior determinations involving ITS, of which FSS is the operational arm, the NMB has exercised, and not declined, jurisdiction. As demonstrated by those cases, the activities carried on by FSS employees are those of air carriers. Finally, the NLRB has not, previously, exercised uncontested jurisdiction over FSS. None of the exceptions apply here, and the Board should refer this matter to the NMB for an opinion. This is even more true in the instant case, where the legal standard for invoking RLA jurisdiction is in flux, and this Board has already decided, in 2017, to refer to the NMB for an opinion. *See,* Referral letter in the *ABM Onsite Services – West, Inc.* case, dated May 18, 2017, attached hereto, in which the Board has already exercised its discretion to refer the matter to the NMB for an opinion. The Board should do so here, too.

CONCLUSION

For all of the foregoing reasons, and for the reasons originally set forth in support of its motion for summary judgment/to dismiss, Respondent Flight Services and Systems, Inc. again respectfully requests that its motion be granted.

Respectfully submitted,

/s/ Timothy A. Marcovy
TIMOTHY A. MARCOVY

/s/ Thomas P. Marotta
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CERTIFICATE OF SERVICE

Copies of Flight Services & Systems, Inc.s Reply to the General Counsel's Opposition to its Motion for Summary Judgment/To Dismiss, and of the were served electronically, by email, upon Alejandra Hung and Gene Switzer, counsel for the General Counsel, Region One, at Alejandra.Hung@nlrb.gov and at Gene.Switzer@nlrb.gov, and on Ingrid Inava, Counsel for SEIU, Local 32 BJ, at inava@seiu32bj.org, this 25th day of September, 2017.

/s/ Timothy A. Marcovy
TIMOTHY A. MARCOVY

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1015 Half St., S.E.
Washington, D.C. 20570-0001

May 18, 2017

Ms. Mary L. Johnson
General Counsel
National Mediation Board
1301 K Street, NW -- Suite 250 East
Washington, DC 20005-7011

Re: ABM Onsite Services - West, Inc.
Cases 19-RC-144377, 19-CA-153164

Dear Ms. Johnson:

The above-captioned proceeding is currently pending before the National Labor Relations Board. In the underlying representation proceeding, the NLRB, over then-Member Miscimarra's dissent, concluded that, under recent National Mediation Board decisions, the Employer is not subject to the Railway Labor Act. In *ABM Onsite Services – West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), the court remanded the case to the Board, holding that the NMB cases on which the NLRB's representational decision relied represented a departure from longstanding NMB precedent.

Consistent with the court's opinion, the Board respectfully requests that you review the record and provide the NLRB with your opinion as to whether the NMB has jurisdiction over the Employer. In doing so, we request that the NMB address the concerns expressed in the court's decision.

The issues are set forth in the various attachments, including the D.C. Circuit Court's opinion, the Regional Director's Decision and Direction of Election in the underlying representation case, and the transcripts and exhibits from the hearings held in the NLRB representation proceeding. Should you require further information about the record in the representation proceeding, please contact Mr. Ronald K. Hooks at (206) 220-6310.

The Board would appreciate your opinion in a form appropriate for citation or quotation in any decision the NLRB may subsequently issue. It is respectfully requested that the enclosed formal documents be returned with your opinion.

Sincerely,

Susan Leverone
Associate Solicitor

Enclosures

cc: Mr. Gary Shinners
Mr. Ronald K. Hooks